Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Fostering Innovation and Investment in the Wireless Communications Market	GN Docket No. 09-157
A National Broadband Plan for Our Future	GN Docket No. 09-51

INITIAL COMMENTS OF NEXTG NETWORKS, INC.

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Pursuant to the Notice of Inquiry ("NOI") released August 27, 2009 in the captioned dockets, NextG Networks, Inc., on behalf of its operating subsidiaries NextG Networks of NY, Inc., NextG Networks of California, Inc., NextG Networks Atlantic, Inc., and NextG Networks of Illinois, Inc. (jointly "NextG"), respectfully submits these Comments. NextG applauds the Commission for commencing this proceeding about one of the most critical sectors of the U.S. economy and appreciates the opportunity to submit information to the Commission to further innovation and investment in the wireless industry, and in particular, in wireless infrastructure.

I. INTRODUCTION AND SUMMARY

The Commission has requested general "comment on whether there are policies and processes that the Commission does not have in place that could promote wireless innovation." NOI at ¶ 5. In Section II(D) of the NOI, the Commission specifically requested comment "on whether there are ways to alter the role of tower siting in the design and deployment of network resources, " and "whether … technologies [such as Distributed Antenna Systems (DAS")] and approaches are likely to encourage innovation by promoting cost savings and reducing regulatory burdens and uncertainty associated with traditional antenna and equipment placements at tower sites, and whether there are steps we could take to promote their efficiency." NOI at ¶ 53. For the reasons set forth in detail in these Comments, NextG believes that there are specific steps that the Commission can and should take to further promote its strong policies in favor of investment, innovation, and deployment.

NextG is a DAS provider and will focus its discussion on two issues of particular importance for it and other DAS providers: (1) lengthy delays and regulatory overreaching by local governments and (2) impediments by pole owners to prompt access to utility poles on rates, terms and conditions that are just and reasonable.

With respect to local government regulation and approvals, NextG has faced and continues to face numerous situations where local requirements and actions have significantly delayed action on allowing NextG to deploy its network – six months, twelve months, even in some cases over two years. Because NextG's facilities are essentially collocations – attaching fiber-optic cable, small antennas, and equipment – to utility poles in existing rights of way and utility easements there is no basis for the type of delay NextG has routinely encountered. It is wholly a matter of local authorities reacting to the existence of an antenna, no matter how small or how low powered.

At least one step the Commission can, and should, take to remedy the problem of municipal delay is by granting the petition filed by CTIA in WT Docket No. 08-165, commonly known as the CTIA "Shot Clock" Petition. Specifically, NextG submits that the Commission should (1) clarify the time period in which a state or local authority take action on a request to deploy wireless facilities, (2) declare that a local authority's failure to act within the relevant time frame will result in the application being deemed granted, (3) clarify that 47 U.S.C. § 332(c)(7)(B)(i) bars local actions, inactions, or decisions that have the effect of prohibiting a particular provider from offering service in a given area regardless of whether that area already has at least one wireless service provider, and (4) preempt under 47 U.S.C. § 253 local ordinances that require variances for all wireless siting applications. Further NextG requests that the Commission make clear that these rules would protect providers such as NextG and the deployment of DAS networks on existing poles and structures in the public rights of way. In addition, NextG submits that the Commission should clarify that local authorities cannot lawfully impose "zoning" requirements on DAS deployments in the public rights of way, particularly when the requirements are discriminatorily imposed on telecommunications

providers, like NextG, who install an antenna, but not the many other forms of attachments (*e.g.*, fiber-optic cables, junction boxes, transformers, etc) that may not have an antenna.

With respect to access to utility poles, NextG routinely encounters lengthy delays, demands for exorbitant, allegedly "market" pole rental fees, categorical denials of access to pole tops on the basis of unfounded safety concerns, and a host of egregious terms and conditions of attachment. NextG believes that this problem stems in large part from the fact that the Commission has not adopted wireless-specific pole attachment regulations.

The Commission already has open a rulemaking, *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM-11293 and RM-11303 ("Pole Attachment Docket"), with a fully-developed record that supports adoption of specific wireless pole attachment rules addressing rates, terms, and conditions, and in particular, timing. NextG and other attaching parties, such as the DAS Forum, have submitted specific proposals and supporting evidence that the Commission should now adopt. By acting on the long-pending Pole Attachment Docket, the Commission can immediately promote investment and the deployment of innovative technologies in support of wireless services.

DAS is an exciting new technology that holds the promise of encouraging significant investment and innovation in wireless facilities. However, municipalities and pole owners have the ability – and in some cases, the incentive – to delay, impede or even deny NextG's ability to deploy its DAS networks. The Commission should adopt regulations and policies that eliminate these barriers and thereby promote the rapid, efficient and widespread deployment DAS networks for the benefit of the public.

II. BACKGROUND REGARDING NEXTG'S SERVICES AND NETWORK

NextG is at the cutting edge of the provision of telecommunications services, using existing advanced technologies and capabilities as well as developing new technologies. At the most general level, NextG provides telecommunications services to wireless carriers as a carrier's carrier. Such services enable wireless carriers to provide the next generation of broadband wireless services. NextG provides such a platform for its wireless customers via a relatively new network architecture called DAS that uses fiber-optic cable and small antennas mounted on infrastructure in public rights of way, such as utility poles and lamp posts, to provide telecommunications services to wireless providers.

NextG's telecommunications services in turn allow its wireless provider customers to increase capacity and bandwidth to provide the next generation of broadband wireless services. However, NextG does not itself hold wireless licenses or provide wireless service. Instead, NextG provides wholesale telecommunications services to licensed wireless carriers. To date, NextG has been granted certificates of public convenience and necessity ("CPCN") to provide telecommunications services in 31 states. NextG has deployed its technology in numerous locations across the country by using existing public infrastructure, thereby improving safety, the ability of people to communicate with loved ones, and delivering many of the additional ancillary advantages that accompany broadband deployment.

NextG's telecommunications service and network are currently utilized primarily by CMRS providers; however, its networks and services are not limited to CMRS providers. While frequently focused initially on a specific customer's needs, NextG can host multiple carriers and is therefore an efficient, cost-effective alternative for the deployment of multiple wireless telecommunications facilities. In other words, NextG enhances the performance of existing

mobile wireless infrastructure with minimally intrusive installations using, to the extent possible, existing infrastructure.

As wireless providers seek to deploy the next generation of broadband wireless services, one of the central obstacles they face is the technical limitations of traditional "high site" antenna towers (typically 60 feet or higher) and zoning issues associated with their placement (most often, on private property). Traditional towers and rooftops are good solutions for providing low-capacity, wide area coverage (assuming the sites can be built or acquired where they are needed). However, as demand for capacity on the network grows, however, more and more sites must be added to the network so that the frequency spectrum that a particular operator owns can be re-used more often. [1]

One of the most effective ways to add sites is through the use of "low site" antennas (placed typically at less than 60 feet above ground). The low antenna sites facilitate a greater re-use of the wireless spectrum since the antennas are well isolated from each other, thus resulting in a much higher capacity and quality network that cannot be delivered by traditional means. In addition, a network of low sites in an urban area can provide coverage in many areas, or dead spots, that would be shadowed by the traditional antenna locations. Higher capacity and greater coverage in turn are the necessary building blocks for wireless broadband.

The DAS networks that NextG installs typically are comprised of (1) fiber-optic cable, which is attached horizontally to utility poles in the traditional manner; (2) small pole-mounted antennas; and (3) small pole-mounted equipment boxes containing transmission electronics for the system connected to the fiber-optic cable and antennas. While NextG serves wireless

[1] Capacity in a cellular network comes from reusing spectrum. The greater the number of radiating elements, the more often spectrum can be reused and the more capacity the network will have.

providers and incorporates antennas into its network, its system consists primarily of wireline (fiber-optic cable) deployments. The equipment NextG is deploying for its current DAS networks typically includes either an omnidirectional antenna or a directional panel antenna, as well as an equipment box located on the pole's unusable space in various sizes depending on the particular deployment. Pictures of typical installations of NextG s equipment on utility poles are provided in Attachment 1.

While the Commission's description of the network architecture and technological benefits of DAS networks contained in paragraph 53 of the NOI is generally accurate, one nuanced – but important – point of clarification is in order. Footnote 63 of the NOI states, "If DAS towers do have to be constructed, they may be smaller than other antenna sites, thus minimizing the construction expenses and environmental reviews." NextG – and to its knowledge, other DAS providers – generally do not construct DAS "towers." Instead, NextG uses pre-existing infrastructure such as utility poles, lamp posts, and street lights to deploy antennas and equipment boxes, which makes DAS networks both unobtrusive, using existing utility infrastructure in corridors where additional attachments blend into the environment, and capable of being rapidly deployed – but only if access to pre-existing infrastructure can be obtained and regulatory approvals can be secured.[2]

The benefits and characteristics of DAS makes it particularly well suited to support innovation in the wireless industry. These characteristics include the following:

[2] In some cases, NextG has installed a new utility pole or worked with communities to install new street light poles, on which NextG can install its facilities. There have been significant areas of NextG's deployments, however, where reasonable terms could not be negotiated with certain municipal utilities, and in those cases, NextG has had to place its own, new infrastructure in the right of way.

- **Wireless Broadband Delivery Platform**. In addition to carrying traditional mobile voice communications, NextG's DAS networks permit carriers to offer a full suite of next-generation mobile broadband services, including 3G and 4G services, LTE, Internet access, Wi-Fi and WiMAX.[3]
- **Host for Multiple Carriers**. While frequently focused initially on a specific customer's needs, NextG 's DAS networks can and do host multiple wireless carriers and are therefore an efficient, cost-effective alternative for the deployment of multiple wireless telecommunications facilities.
- **Technologically Neutral Platform.** NextG's DAS technology is "protocol agnostic" and is capable of carrying all RF traffic, including 700Mhz, GSM, CDMA, EDGE,[4] EV-DO, [5] 1xRTT,[6] UMTS,[7] WiMAX, LTE,[8] as well as traditional backhaul.
- **Diverse Geographic Options and Scalability**. NextG has deployed DAS networks in a variety of geographic settings, including
    - major metropolitan areas such as New York City, Los Angeles, San Francisco, Chicago, Detroit, Boston, Philadelphia, Atlanta, and San Diego;

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3 "Worldwide Inter-Operability for Microwave Access," a telecommunications technology that provides wireless transmission of data using a variety of transmission modes, from point-to-multipoint links to portable and fully mobile Internet access.

4 "Enhanced Data Rates for GSM Evolution," a 3G mobile phone protocol.

5 "Evolution-Data Optimized," a telecommunications standard for the wireless transmission of data through radio signals, typically for broadband Internet access.

6 "1 times Radio Transmission Technology," the core CDMA2000 wireless air interface standard.

7 "Universal Mobile Telecommunications System," a 3G mobile telecommunications technology.

8 "Long Term Evolution," the next major step in mobile radio communications, which will be introduced in 3rd Generation Partnership Project Release 8.

- suburban areas such as Carlsbad, Encinitas, Compton, Malibu, and Del Mar, California; Brookline, Cambridge, and Somerville Massachusetts; Princeton, New Jersey; and Long Island;
- on college campuses such as the University of Texas, University of Notre Dame, University of Wisconsin, University of California (Santa Cruz and San Diego campuses), California State University - San Bernardino, and San Diego State University;
- and even rural areas, such as Highway 50 in the Sierra Nevada Mountains.

Because NextG's DAS networks are completely scalable, they can range in size from a few nodes covering a limited area (for example, to fill in a wireless coverage gap in a small area) to a specific neighborhood within a city or even to a very large DAS system deployed throughout major metropolitan area. This gives DAS the flexibility, for example, to facilitate targeted wireless broadband access in underserved areas, such as in low-income neighborhoods or to deliver broader access across a broader region. Although DAS has historically been used primarily in more densely populated areas because they offer the prospect of a higher return on investment, DAS systems are well suited for deployment in rural areas as well.

- **Rapid Deployment**. Because DAS networks use pre-existing infrastructure, such as utility poles, lamp posts, and street lights, these networks are capable of being deployed in a matter of months – ***if*** reasonable access to infrastructure and local approval can be secured (which has been a problem in too many instances).

III. THE COMMISSION SHOULD ACT TO ELIMINATE THE SIGNIFICANT DELAY BY MANY LOCAL AUTHORITIES FOR DAS APPROVAL, WHICH IMPEDES INVESTMENT IN, AND RAPID DEPLOYMENT OF, WIRELESS SERVICES

The Commission has inquired about whether DAS networks are "likely to encourage innovation by promoting cost savings and reducing regulatory burdens and uncertainty associated with traditional antenna and equipment placements at tower sites, and whether there are steps we could take to promote their utility." NOI at ¶ 53. As discussed in the previous section, DAS networks unquestionably encourage innovation in the wireless industry. The more pertinent question for purposes of this proceeding is whether the Commission can and should adopt regulatory policies that will be conducive to the rapid, efficient deployment of DAS networks. NextG respectfully submits that there is a need for regulatory policies and rules that the Commission can, and should, adopt that will curb one serious impediment to DAS deployment – significant delays on the part of local authorities.

A. NextG Routinely Encounters Significant And Unreasonable Delays And Burdensome Regulatory Requirements By Local Municipalities

While NextG has successfully worked with many communities to allow it to timely deploy its DAS networks, too often NextG has encountered significant difficulty in receiving timely approval from local authorities for the deployment of its DAS network facilities.[9] The delays NextG has faced are particularly troublesome given that the majority of NextG's applications and requests are to collocate its equipment on existing structures in existing public

[9] While many of these delays are not technically classified under the label of the cities' "zoning" codes, *per se*, they are nonetheless delays that result from zoning-equivalent discretionary permitting processes that significantly impact the deployment of networks that facilitate the provision of wireless service. Indeed, the Commission should make clear that rules prohibiting delay are not limited to the "zoning" context.

rights of way and utility corridors, do not involve extensive construction, and will result in *de minimis* aesthetic disruption, at most.

The following are several representative examples of the types of municipal delays routinely encountered by NextG.

- In Lynn, Massachusetts, NextG filed a formal petition to install its DAS network facilities in the City rights of way on August 29, 2007. The City originally set NextG's petition for public hearing on September 20, 2007, but without any stated reason rescheduled the hearing of NextG's original petition to a public meeting to be held on October 9, 2007. Facing strong resistance from the City, and after a network design change, NextG filed a revised version of its original petition on February 22, 2008. On March 25, 2008, NextG responded to the City's request for more detailed information regarding the proposed network. On March 26, 2008, the City indicated that it would not schedule NextG's petition for a public hearing on April 1, 2008, and further indicated that NextG should strike its petition entirely and submit 19 separate petitions for the different proposed components of NextG's planned network. The City stated that it would not accept those reformatted and resubmitted petitions – requesting permission for the exact same network – until its meeting on May 13, 2008 and set them for public hearing on June 10, 2008 – more than 9 months after NextG filed its original petition. Ultimately in June 2008, after having been delayed for nearly 10 months, NextG filed suit in federal court for relief from the City's burdensome, arbitrary and discriminatory process. On August 12, 2008, and September 9, 2008, the City Council voted to deny NextG's construction, altogether. While NextG and the City ultimately entered into a settlement agreement, the case is nonetheless an important example of lengthy municipal delay.

- In three other Massachusetts towns, approval of NextG's petition to construct its DAS network took at least six and as many as ten months, even though NextG sought to install its facilities entirely on existing poles in the public rights of way. In yet another Massachusetts town, NextG's application took more than a year to be approved.

- In another California city, NextG was already approved to install DAS facilities on utility poles in the public rights of way, and simply sought a permit from the city to install a newer model antenna that served the same function as equipment previously approved and installed. The city took 12 months to approve this minor change.

- Between 2004 and 2008, in four other southern California municipalities, approval of NextG's applications to locate DAS facilities in the public rights of way took 9, 10, 14, and 19 months, respectively.

- Four other Southwestern municipalities took 13, 26, 19, and 25 months to consider and approve NextG's requests to install the nodes and fiber for its DAS network on poles in the public rights of way. In those instances, no more reason was given for the delay than

that the deployment of a DAS network and the deployment of wireless telecommunications services was simply a very low priority to those cities.

- In another Southwestern locality, NextG submitted an application letter and began negotiations with the local authorities for authorization to collocate its facilities in the already occupied public rights of way. Those negotiations lasted for six months before the local authority even provided its standard application form, and even after completing and submitting the locality's own application form NextG's request was not granted for another six months.

- In one city in the Mid Atlantic region, NextG encountered a complete unwillingness by the city to even engage NextG's requests to deploy. This went on for nearly three years, at which point, NextG was able to obtain only a one year, "interim" authorization.

These are just representative examples of local authorities that oppose the deployment of new telecommunications facilities, particularly if an antenna is involved, and will use their authority over the public right of way or over zoning to delay and deter such deployment for as long as possible (in hopes of deterring it permanently).

Municipal delays are particularly problematic for a DAS carrier like NextG because it constructs networks for other parties – wireless carriers – who have business expectations of a firm delivery date for NextG's service. Protracted delays, often of indefinite duration, make create a very difficult business climate, and delay investment in wireless networks and the creation of jobs.

B. The Commission Should Grant CTIA's "Shot Clock" Petition

The Commission has full authority to remedy the problems of lengthy delays for municipal approval of DAS deployment. One example is the on-going proceeding initiated by CTIA, commonly known as the CTIA "Shot Clock" Petition,[10] which is complete with a rich evidentiary record through which the Commission can act to address delays on the deployment

[10] *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165.

of wireless facilities. As NextG stated in its comments in that Docket, the Commission should promptly grant CTIA's Petition.

As the Commission is well aware, the primary purpose of the Telecommunications Act of 1996 was to "accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition ... ."[11] In advancing that purpose, Congress enacted Section 332(c)(7) to reduce "the impediments imposed by local governments upon the installation of facilities for wireless communications" and to "impose[] specific limitations on the traditional authority of the state and local authorities to regulate the location, construction, and modification" of the facilities necessary for wireless communications.[12] Thus it is Congress's express policy to promote the rapid deployment of wireless communications facilities and infrastructure and to limit the ability of local authorities to impede such rapid deployment.

DAS networks are an important technological advancement in the deployment of wireless networks. Given that Congress has stated that "[i]t shall be the policy of the United States to encourage the provision of new technologies and services to the public,"[13] the development and expansion of DAS networks is to be promoted and will further Congress's objectives of enhancing competition and advancing wireless services to the benefit of the nation at large. Burdensome application processes imposed by local authorities and their resulting delays only serve to retard the development of advanced wireless services and Congressional intent.

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11 H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 1 (1996).

12 *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005).

13 47 U.S.C. § 157.

NextG supports CTIA's Petition. Specifically, NextG submits that the Commission should adopt CTIA's proposed timelines within which local authorities must act upon wireless collocation (45 days) and other wireless siting applications (75 days), or such applications will be deemed granted. Grant of CTIA's Petition would significantly promote and support the deployment of wireless technologies, and in particular, the wireless technologies necessary for the full achievement of the promise of wireless broadband services. The time frames proposed by CTIA are reasonable and consistent with similar time frames adopted by some states to limit delays by local authorities.

In addition, NextG supports CTIA's request for clarification on the interpretation of 47 U.S.C. § 332(b)(7)(B)(i). The policies and language of the Communications Act cannot support a rule that would allow cities to deny entry to providers solely because a single provider had successfully deployed at some point in the past. Such an interpretation fundamentally conflicts with the pro-competitive goals of the Telecommunications Act of 1996. Moreover, it conflicts with other sections of the Act, such as Section 253(a), which prohibits cities from imposing requirements that prohibit or have the effect of prohibiting the ability of "any entity" to provide any telecommunications service. Likewise, NextG supports CTIA's request for clarification that 47 U.S.C. § 253 preempts local ordinances that require any "wireless" deployment to obtain a variance. Such requirements are a significant barrier to deployment and conflict with the Commission's goals of promoting innovation and investment in the deployment of wireless networks. As such, the Commission should also make clear that any shot clock rules apply to DAS deployments

C. The Commission Should Clarify That Local Governments Cannot Impose "Wireless" Zoning Requirements On Public Rights Of Way Deployments

A significant area of uncertainty that has lead to much of the delay encountered by NextG and other DAS providers is the applicability of local "zoning" requirements to DAS installations in the public rights of way. NextG and other DAS providers are fundamentally wireline CLECs, and as a result, they operate under Certificates of Public Convenience and Necessity ("CPCN") issued by state public utility commissions. NextG's installations are on utility or similar poles in public rights of way and consist of fiber optic lines, small equipment boxes, and small antennas. Indeed, in most areas, the equipment that NextG proposes to place on utility poles is the same size as or smaller than equipment boxes installed by other users, such as telephone companies, cable operators, and electric companies.

In NextG's experience, none of the other occupants of utility poles in the public rights of way, e.g. cable, telco, and electric, are required to undergo any discretionary "zoning" approval before installing their equipment in the public rights of way. Yet, in many communities, local ordinances impose discretionary "zoning" obligations based solely on the existence of a commercial wireless antenna. Communities taking this kind of approach are impeding innovation and deployment of broadband and should be preempted.

First, zoning requirements that are imposed on DAS solely as a result of the existence of an antenna are regulating the location of wireless facilities based on RF emissions in violation of Section 332(c)(7)(B)(iv), 47 U.S.C. § 332(c)(7)(B)(iv). In a situation where a DAS provider that holds a CPCN is installing equipment boxes and lines that are the same basic size as those already deployed by other users, any zoning requirement that is imposed solely on the DAS provider because of the commercial "wireless" nature of the antenna is inherently regulating based on the RF emissions. If the zoning requirements were directed at "land use" issues, or

even aesthetics, then all of the other utility equipment would also be subject to the same requirements. But they are not. Electric transformers, which are typically much larger, heavier, and potentially more dangerous than NextG's DAS installations, are not subject to discretionary zoning. Likewise, ILEC equipment boxes, particularly for their fiber deployment, are frequently substantially larger than NextG's, but they are not subject to discretionary zoning. From a land use perspective, the public rights of way have already been designated for precisely the type of communications utility use that DAS presents. By imposing requirements based on the fact that one piece of equipment emits RF (or more specifically, commercial wireless service), the local government is regulating the deployment of wireless facilities based on RF emissions, which is clearly prohibited.

Second, in addition, the imposition of municipal zoning on DAS installations in the right of way is discriminatory. While other right of way users are able to deploy by obtaining administrative, over-the-counter encroachment permits (or the like), in an increasing number of communities, DAS deployments in the same right of way are required to submit to multi-layer, burdensome, and discretionary zoning processes that may ultimately purport to deny the DAS provider the right to deploy at all. In those cases, the wireless zoning requirements generally were adopted with tall tower locations in mind, and thus impose requirements that make no sense when applied in the public right of way context. For example, installation of a twenty four inch tall, one inch diameter omnidirectional, "stick" antenna at the top of an existing utility pole can trigger "set back" requirements that never can be met (because the public right of way is not wider than a 40 foot tall pole) but that did not apply when the same pole, holding a host of electric and communications equipment, was installed initially. Moreover, in the case of some ordinances, antennas are installed on poles in the rights of way by the electric utility, e.g. for

status monitoring, but they are not subject to the same zoning requirements because the ordinances apply only to "commercial wireless" facilities. Thus, the requirements are not only discriminating, they are ultimately regulating based on the service provided.

Far too frequently, to the extent NextG encounters delay and opposition, it is in municipalities that are seeking to impose "zoning" requirements on NextG's deployment in the public rights of way. Such requirements are being imposed solely because of the RF element of NextG 's installation and are discriminatory because such requirements are not imposed on the other users of the pole. Regardless of what zoning control local authorities may have over traditional wireless deployments on private property, the Commission can and should clarify that local authorities cannot discriminatorily impose zoning or "land use" requirements on DAS installations in the public rights of way.

IV. THE COMMISSION SHOULD ACT TO ENSURE THAT DAS PROVIDERS AND WIRELESS CARRIERS HAVE ACCESS TO UTILITY POLES ON RATES, TERMS, AND CONDITIONS THAT ARE JUST AND REASONABLE

Because DAS networks are designed to make use of pre-existing infrastructure, particularly utility poles, prompt access to this infrastructure subject to reasonable rates, terms, and conditions is critical to promoting investment and innovation in wireless facilities. Unfortunately, however, NextG routinely faces significant problems from pole owners in securing fair and reasonable attachment rights on utility poles. As NextG and other attaching parties have communicated to the Commission previously in the Pole Attachment Docket, there is an immediate need for wireless-specific pole attachment regulations in order to promote innovation and investment in wireless facilities.

A. NextG's Experience With Securing Access To Utility Poles

Even though NextG's DAS networks are chiefly wireline (see Section II), NextG nevertheless has encountered obstacles to the placement of its facilities on utility poles throughout the country. In particular, NextG is concerned with timely performance of pre-construction surveys and make-ready and the interpretation of what should be generally applicable construction standards in ways that unreasonably preclude the use of certain poles or force NextG to install its plant beyond what the applicable standards actually require.[14] In this way, NextG has been subject to unreasonable access denials and excessive, unnecessary make-ready delays and costs.

In NextG 's experience, some pole owners make unsupported claims that certain wireless structures on distribution poles are unsafe. As has been established, these claims are untrue. Wireless devices can be, and have been, safely installed on utility poles, including at the pole top, without adversely affecting safety or reliability.[15] Indeed, the National Electrical Safety Code ("NESC") already contains rules governing such attachments.[16] The fact remains that distribution poles are essential, bottleneck facilities in the possession of monopolies, some of

[14] Despite the fact that the NESC addressed clearance and other issues, pole owners sometimes impose construction standards and limits that exceed the NESC. There is no basis for such excessive demands. Moreover, the variation among pole owners' "standards" creates uncertainty and makes it difficult for attaching parties to plan their deployments and estimate costs. This is particularly the case where the utility responds to a request to attach by asserting that it must first develop construction standards specifically for wireless attachments – a process that then takes many months if not years. The Commission should clarify that the NESC governs all attachments and that individual pole owners cannot impose more strenuous standards, particularly on fundamental issues addressed by the NESC, such as clearances or delay attachment in order to develop entirely new construction standards.

[15] *See, e.g., Implementation of Section 224 of the Act: Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM-11293 and RM-11303, Initial Comments of NextG Networks, Inc. at 15-18, Reply Comments of NextG Networks, Inc. at 15-21.

[16] *See id.*

which compete directly with certain wireless attachers. In part of its initiative to encourage innovation and investment in wireless services, the Commission should act in the Pole Attachment Docket to adopt rules to ensure that pole owners are not using their unique position to thwart deployment of competitive networks or to leverage an unlawful windfall profit.

Delays in obtaining attachment rights are significant problem facing NextG. As more fully described in NextG's comments in the Pole Attachment Docket,[17] when NextG initially approaches a utility to request attachment, the response commonly is "no, wireless attachments are not permitted because of company policy" or "no, because wireless attachments are not safe." Often, NextG is directed to discuss attachment with the utility's "business development" group, which is tasked with treating pole attachments not as a regulated obligation of the utility, but as a profit center. (Ironically, these "business development" groups have developed "safe" methods for attachment of antennas to transmission infrastructure that carries much higher voltages and therefore pose much more serious safety and reliability issues than distribution infrastructure that allegedly raises insurmountable safety concerns.) However, once the pole owner has been convinced through strenuous effort – and time – that the joint use department of the utility is a more appropriate group to handle NextG's agreement, in almost all cases, pole owners have claimed that they do not have a "wireless" attachment agreement or construction standard for distribution poles, and so they cannot respond to NextG's request for access until the utility develops one. This usually takes several months or even years, and in more than one situation, the utility has still not provided the wireless-specific exhibits to its form agreement more than

[17] *See, e.g., Implementation of Section 224 of the Act: Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM-11293 and RM-11303, Initial Comments of NextG Networks, Inc. at 6-8, Reply Comments of NextG Networks, Inc. at 10.

two years after NextG initially contacted the utility. After months -- and often *years* -- of discussions and negotiation, many (but by no means all) utilities have moved beyond their initial objections and negotiated mutually acceptable methods of attachment. However, the inability to design DAS networks in the interim due to the uncertainties regarding what NextG can attach and where it can attach has caused significant problems for NextG and severely impeded its ability to serve its customers and the public. In nearly all cases, it is insinuated (and sometimes flatly stated) that "commercial rates" (*i.e.* rates far in excess of just and reasonable rates under the Commission's regulations) would provide enough incentive for utilities to develop the forms, agreements and policies to move forward with such attachments. Faced with a dilemma of either engaging in lengthy regulatory proceedings, or possibly losing its contracts, NextG has forced to concede in various instances to rates that are not lawful under the Commission's regulatory formula.

Another flavor of this sort of utility response is exemplified by one large power utility that covers large portions of the southern United States. This particular electric utility refused to enter into an attachment agreement or discuss rates, terms and conditions or where NextG could attach antennas on the pole until NextG identified the specific pole(s) intended for use. This precondition of negotiations made it impossible to design and market a DAS network in those areas. [18]

The Commission should make clear that the attachment of an antenna is not the opportunity for a pole owner to invent a whole new attachment regime. Delays like those

[18] Because NextG maintains a politically sensitive relationship with such pole owners, it is constrained in its ability to be more specific at this time. Moreover, utilities commonly require NextG to sign non-disclosure agreements as a condition of even being provided a copy of the utility's agreement terms, thus further constraining NextG's discussion here.

encountered by NextG and others are delaying the deployment of competitive networks and services. Indeed, the Commission has recognized the public policy benefits of affording wireless carriers with access to utility poles as it "facilitates the deployment of cell sites to improve the coverage and reliability of their wireless networks in a cost-efficient and environmentally friendly manner. Such deployment will promote public safety, enable wireless carriers to better provide telecommunications and broadband services and increase competition and consumer welfare in these markets."[19]

B. NextG's Experience with Pole Attachment Rates

Despite the Commission's repeated rulings and "reminders" that utilities are required to charge historic, cost-based pole attachment fees for wireless devices,[20] NextG's first-hand experience across the country is that these rulings often are being ignored by utilities. Although some utilities have employed a cost-based formula, typically the telecom rate multiplied by the number of feet occupied by the attached devices, NextG has encountered others who seek to impose fees that clearly have no relation whatsoever to the utility's costs of owning and maintaining a pole. As discussed above, multiple utilities have referred NextG to their non-regulated "business development" group, which demand exorbitant "market" based rates that have no relation to pole costs and instead, are clearly intended to extract the maximum possible

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[19] *Wireless Telecommunications Bureau Reminds Utility Pole Owners of Their Obligations to Provide Wireless Telecommunications Providers with Access to Utility Poles at Reasonable Rates*, Public Notice, 19 FCC Rcd. 24930 at 1 (Wireless Telecom. Bureau 2004) ("Public Notice").

[20] *Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 FCC Rcd. 6777 at ¶ 42 (1998); *Omnipoint Corp. v. PECO Energy Co.*, Memorandum Opinion and Order, 18 FCC Rcd. 5484 at ¶ 7 (Enf. Bur. 2003); *Wireless Telecommunications Bureau Reminds Utility Pole Owners of Their Obligations to Provide Wireless Telecommunications Providers with Access to Utility Poles at Reasonable Rates*, Public Notice, 19 FCC Rcd. 24930 (Wireless Telecom. Bureau 2004).

monopoly pole rents from third party attachers. Essentially, these "business development" groups attempt to force NextG to pay profit-based attachment rates modeled after the rates the utility charges for attachment of full-blown cell sites to unregulated transmission towers. Several electric utilities across the United States impose annual attachment fees of $1,200 per pole or more for wireless attachments.[21] Again, these annual fees bear no relation to the cost of owning and maintaining a utility pole whose depreciated cost to the utility may only be a few hundred dollars. Further, this sort of "market based rate" model by investor-owned utilities ("IOUs") has a ripple effect that extends to other pole owners that are not subject to Section 224, such as municipal utilities. These entities base their rates on what their neighboring IOUs have extracted, and frequently exceed the IOU rates by two or three times, and because they are unregulated, there is no recourse. Unfortunately, the unreasonable demands of some electric utilities have interfered with NextG's ability to market and deploy DAS networks, and thereby inhibit wireless investment.

Indeed, the matter is particularly exacerbated in the case of pseudo-municipal utilities, who regularly have programs that compete with NextG for services (often selling fiber backhaul and who have significant, separate marketing departments for the wireless industry). Two such municipal utilities include Long Island Power Authority ("LIPA") in New York and the Salt River Project ("SRP") in Arizona. The pole attachment rates for both of these companies require the payment of annual rental in the order of thousands of dollars per year. And the dilemma is serious for both NextG and local authorities: since the attachment rates are prohibitively expensive for NextG's "carrier's carrier" business model, the company has no choice but to

[21] *See, e.g., Implementation of Section 224 of the Act: Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM-11293 and RM-11303, Reply Comments of NextG Networks, Inc. at 5-6.

place its own, new utility poles in the right of way. This creates unnecessary additional infrastructure that offends citizens and does not promote efficiency.

C. The Commission Should Act To Remedy These Abuses By Pole Owners

The Commission has requested comment on "whether there are policies and processes that the Commission does not have in place that could promote wireless innovation," (NOI at ¶ 5) and comment " "whether … technologies [such as DAS] and approaches are likely to encourage innovation by promoting cost savings … and whether there are steps we could take to promote their efficiency." NOI at ¶ 53. Section 224 of the Communications Act gives the Commission full authority to remedy the abuses of pole owners and encourage investment and innovation in wireless facilities by requiring pole owners to afford DAS providers such as NextG and other wireless third-party attachers access to poles on just and reasonable rates, terms and conditions and in a prompt and timely manner.

As NextG and numerous other attaching parties have established in the Pole Attachment Docket, the *status quo* is not working. While the Commission has announced its policies with respect to wireless attachments in various orders, one adjudicatory proceeding and a public notice, it is clear that more must be done because utilities in many cases are ignoring these orders. A set of wireless-specific attachment rules is needed in order to eliminate ambiguity and to clearly identify the rights of attachers using wireless facilities and the obligations of utility pole owners with respect to wireless attachments. By adopting the rules proposed by NextG, the DAS Forum, and other wireless industry attaching parties in the Pole Attachment Docket, the Commission can help eliminate barriers to investment and innovation in the wireless industry.

V. CONCLUSION

Based on the foregoing comments, as well as other comments submitted in this docket, NextG respectfully submits that the Commission should act to adopt rules and policies that will promote and assist investment and innovation in the wireless industry. In particular, NextG submits that the Commission should take steps to prevent delay and overreaching by local government authorities and pole owners.

Respectfully Submitted,

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Attachment 1
Pictures of Representative NextG DAS Installations


MIRA MESA BL.


SHOP N
Gigg es


SHOP 'N GO


HOAGIES
Giggles


ORIGINAL
PRETZEL FACTORY
SHOP 'N'G